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February 7, 2003

The Honorable Blake K. Oshiro
Representative, Thirty-Third District
The Twenty-Second Legislature
State of Hawaii
State Capitol #332
Honolulu, Hawaii 96813

Dear Representative Oshiro:

Re: The Constitutionality of School Vouchers in Hawaii

This is in response to your letter dated October 18, 2002,
in which you requested legal advice regarding school vouchers.

ISSUES RAISED

1. Is Zelman v. Simmons-Harris, -- U.S. --, 122 S.Ct. 2460 (2002), distinguishable in Hawaii?
2. Would a school voucher program violate the Hawaii State Constitution?

BRIEF ANSWERS

1. Yes. In Zelman, the United States Supreme Court held that the Ohio school voucher program did not violate the Establishment Clause of the United States Constitution, which prevents a State from enacting laws that have the purpose or effect of advancing or inhibiting religion. Zelman is inapposite in Hawaii because a Hawaii school voucher program would be precluded under Article X, Section 1 of the Hawaii State Constitution and not the Establishment Clause of the United States Constitution. Significantly, the Establishment Clause was drafted to promote the separation of church and state and Article X, Section 1 of the Hawaii State Constitution was drafted for policy

reasons that have nothing to do with religion.

2. Yes. Considering the Hawaii Supreme Court's previous interpretation of Article X, Section 1 in Spears v. Honda, 51 Haw. 1, 449 P.2d 130 (1968), a school voucher program would violate the Hawaii State Constitution.

DISCUSSION

At the outset, it is necessary to understand that our office analyzed the above-listed issues without detailed knowledge of a particular school voucher program that the legislature may be considering. Our analysis would likely be more focused and specific if we were examining the constitutionality of a particular school voucher proposal. Nevertheless, we believe the issues you raised are relevant and timely and warrant the issuance of a formal opinion regarding school voucher programs, in general.

A. Zelman v. Simmons-Harris is Inapposite

As noted above, Zelman v. Simmons-Harris, -- U.S. --, 122 S.Ct. 2460 (2002), is inapposite in Hawaii because it was based on federal Establishment Clause analysis. In Zelman, a group of Ohio taxpayers brought an action challenging a school voucher program on the ground that it violated the Establishment Clause of the United States Constitution. The Establishment Clause of the First Amendment of the United States Constitution, which applies to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the "purpose" or "effect" of advancing or inhibiting religion. Agostini v. Felton, 521 U.S. 203, 222-23 (1997). The United States Supreme Court examined the Ohio program and ultimately held that "the program does not offend the Establishment Clause." Zelman, 122 S.Ct. at 2473.

In the wake of Zelman, a school voucher program in Hawaii could conceivably be drafted so that it does not violate the federal Establishment Clause. However, a publicly-funded Hawaii school voucher program would violate Article X, Section 1 of the Hawaii State Constitution, which reads, in relevant part:

[N]or shall public funds be appropriated for
the support or benefit of any sectarian or
private educational institution.

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As you noted in your letter dated October 18, 2002, the Hawaii State Constitution (the "Hawaii Constitution") is more restrictive than its federal counterpart. The federal Constitution does not include the restrictive language of Article X, Section 1 of the Hawaii Constitution.

The disparity between the Hawaii Constitution and the federal Constitution is permissible. Since state constitutions are independent from the federal Constitution, state constitutions may be more restrictive, provided they do not violate any provision of the federal Constitution. See, e.g., Bustop Inc. v. Board of Education, 439 U.S. 1380 (1978). We have no reason to believe that Article X, Section 1 violates any provision of the federal Constitution. Thus, it is our opinion that the restriction against using public funds for the "support or benefit of sectarian or private [schools]" is constitutionally sound.

By way of further explanation, Hawaii is free to use its state Constitution to restrict or prohibit activity that the federal Constitution **permits**. See Hoppock v. Twin Falls School District No. 411, 772 F.Supp. 1160, 1163-64 (D. Idaho 1991). However, when federal law **mandates**, rather than simply permits certain activity, the Supremacy Clause of the federal Constitution takes over and prohibits the states from using their own constitution to block the federal law. Hoppock, 772 F.Supp. at 1164.

Federal law currently permits, but does not mandate state school voucher programs. In Zelman, the U. S. Supreme Court held that the Ohio school voucher program in question was **permissible**. The U. S. Supreme Court did not mandate school vouchers in Zelman, therefore, Hawaii remains free to use its state Constitution to restrict such programs. See Bush v. Palm Beach County Canvassing Board, 531 U.S. 70, 78 (2000) ("It is fundamental that state courts be left free and unfettered by the United States Supreme Court in interpreting their state constitutions").

It is important to understand that, unlike the Establishment Clause of the United States Constitution, Article X, Section 1 of the Hawaii Constitution has nothing to do with religion. A review of the constitutional history of Article X, Section 1 reveals that the prohibition on using public funds to benefit private schools in Hawaii was intended to narrow the "gap"

between the quality of education provided by private schools and public schools.¹ See Spears v. Honda, 51 Haw. 1, 7 n.5, 449 P.2d 130, 135 n.5 (1968).

[T]he intent of the framers of our Constitution regarding the nature of appropriations constituting 'support or benefit' to sectarian and private schools is clear from the proceedings of our Constitutional Convention of 1950 . . . This emphasis on public education can be largely attributed to the fact that, at that time, nonpublic schools in this jurisdiction were considered better able to provide education than public schools, although the latter had shouldered the burden of educating the bulk of the populace and of assimilating vast numbers of offspring of immigrants into the mainstream of American life, despite somewhat shabby treatment by the Legislature.

Id. at 7, 449 P.2d at 135. In a debate held during the Constitutional Convention, Delegate Akau of the Committee on Education stated:

I'd like to speak in favor of 'nor shall the public funds be appropriated for the support or benefit of any sectarian, denominational' school. **Not primarily because I believe in separation of church and state but for the very simple reason that those people who send their children to either parochial schools or private schools send their children there because they wish to send their children there.**

The Proceeding of the Constitutional Convention of Hawaii, Vol. II, 584 (1950) (emphasis added). Considering the clear constitutional history of Article X, Section 1, it would be inappropriate to analyze a publicly-funded Hawaii school voucher program under the federal Establishment Clause line of cases.

¹ Until 1978, Article X of the Hawaii Constitution was numbered Article IX. After the 1978 Constitutional Convention and the November 7, 1978 general election, Article IX was renumbered as Article X.

Thus, Zelman and its progeny are inapposite in Hawaii.

B. School Vouchers Are Unconstitutional Under Spears v. Honda

Given the Hawaii Supreme Court's broad interpretation of Article X, Section 1, it is our opinion that the Court would find a publicly-funded school voucher program unconstitutional in Hawaii. See Spears v. Honda, 51 Haw. 1, 449 P.2d 130 (1968).

In Spears, the only reported case interpreting Article X, Section 1, the Court addressed the constitutionality of a statute requiring State-subsidized bus transportation for all school children, including sectarian and private school students. The Court attributed a great deal of significance to the history of Article X, Section I (see previous section), and found that "[t]he mechanics of the bus subsidy program at issue indicate that the fears of the framers [that the gap between public and private schools would widen] were well-founded." Id. at 12, 449 P.2d at 137. The Court further found that: (1) the bus subsidy "built up, strengthened and made successful" the nonpublic schools; (2) the bus subsidy induced attendance at nonpublic schools, where the school children are exposed to a curriculum that, in many cases, if not generally, promotes the special interests and biases of the nonpublic group that controls the school; and (3) to the extent that the State paid out funds to carriers owned by the nonpublic schools or agents thereof, the State gave tangible "support or benefit" to such schools. Id. at 12-13, 449 P.2d at 137-38. The Court ultimately held that the bus subsidy violated Article X, Section 1, because it constituted an appropriation of public funds to non-public schools.

Assuming the Court applies the rationale it used in Spears, a publicly funded school voucher program would have to overcome a number of significant hurdles to pass constitutional muster in Hawaii.² Without further information as to the specifics of a voucher program, it is our opinion that just as the indirect bus subsidies in Spears were deemed unconstitutional, so would a

² It is possible that the Hawaii Supreme Court could overturn Spears and interpret "support or benefit" differently. However, it is unlikely that this will occur, given the Court's deference to the Constitutional history of Article X, Section 1 in Spears.

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publicly funded school voucher program be deemed unconstitutional.³

Should you have any questions, please do not hesitate to contact us.

Very truly yours,

Joelle K. Chiu
Deputy Attorney General

APPROVED:

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³ It is worth noting that the Court in Spears suggested that the Legislature "return to the people to ask them to decide whether their State Constitution should be amended to grant the Legislature the power that it seeks, in this case, the power to provide 'support or benefit' to nonpublic schools." Id. at 15, 449 P.2d at 139.

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